

Appellant-defendant Luciano D. Yzaguirre appeals his conviction for Murder,¹ a felony, claiming that the trial court erred in admitting a videotape and photographs into evidence at trial. Specifically, Yzaguirre argues that the trial court erred in admitting this evidence because the State failed to lay a proper foundation establishing the accuracy and authenticity of those items. Finding no error, we affirm the judgment of the trial court.

FACTS

On July 23, 2006, Martha Rodriguez went to the home of her brother-in-law, Ruben Rodriguez, in Lake Station. Martha was concerned about Ruben because she had neither seen nor heard from him since July 3. After receiving no response from her knock on the door, her daughter, Thirza, who had previously lived with Ruben, used her key and opened the front door.

Upon entering the apartment, Martha and Thirza noticed that there were cigarette butts in an ashtray. The women thought this odd because Ruben did not smoke and did not allow anyone else to smoke in his residence. Martha and Thirza also observed a dish of rotten food on the stove.

Martha opened a bedroom door and saw Ruben's cane lying on the floor. She noticed that the sheets and covers had been removed from Ruben's bed and the dresser drawers were open. Martha also noticed that two flat screen televisions and Ruben's two Cadillac automobiles were missing.

¹ Ind. Code § 35-42-1-1.

Thereafter, Martha contacted the police department. When the officers arrived, they examined Ruben's unopened mail and discovered that all of the items were postmarked on or after July 5, 2006. One of the envelopes contained documentation regarding the purchase of a television set. The officers also found a receipt in the residence from a Hammond Wal-Mart store that was dated July 4, 2006, at 7:11 p.m.

Detective Kevin Garber of the Lake Station Police Department found the titles to Ruben's vehicles in the house and conducted computer checks to see whether the automobiles had been involved in any traffic offenses. He learned that on July 9, 2006, a Highland police officer had stopped Ruben's yellow Cadillac. The driver was identified as Jeffrey Perez, the nephew of Ruben's ex-wife, and Yzaguirre was the front-seat passenger. Detective Garber also learned that on July 19, 2006, a Gary police officer found Ruben's burgundy Cadillac parked in a remote area. The vehicle had been set on fire.

Detective Garber then contacted the Hammond Wal-Mart and obtained a surveillance videotape that showed three men participating in a sales transaction. Comparing still frames that were taken from the surveillance video to photographs obtained from the Bureau of Motor Vehicles (BMV), Detective Garber identified the men as Perez, Yzaguirre, and Andrew Anguiano.

On July 31, 2006, Detective Garber found Ruben's yellow Cadillac parked approximately two blocks from Yzaguirre's Hammond residence. The police impounded the vehicle and had it towed to a Lake Station Police Department garage. During a search of the

vehicle, one of the officers found a piece of duct tape on the floor near the front passenger seat.

Thereafter, Detective Garber obtained a search warrant for Yzaguirre's residence. When the police officers executed the warrant on August 2, 2006, they saw the vehicle that had been used by Perez, Yzaguirre, and Anguiano at the Wal-Mart. Upon further investigation, it was discovered that the vehicle was registered to Perez.

The police found a flat screen television inside the residence that bore the serial number listed on the papers that the police had discovered in Ruben's home. The officers also found \$170 in cash hidden inside a child's doll. During a search of Yzaguirre's yard, the police found two shovels, a wallet, and an identification badge that bore Ruben's name and photograph. The officers also discovered some partially burnt papers in a barbecue grill that had Ruben's name on them. Following the search, Perez, Yzaguirre, and his sister were transported to the Lake Station Police Department for an interview.

Yzaguirre waived his Miranda² rights and agreed to talk with Detective Garber. Yzaguirre denied any knowledge of Ruben's disappearance or the items that were recovered from his property. The next day, the police interviewed Anguiano and several officers drove to an area near Anguiano's residence to search for Ruben's body. At some point, the police noticed some dirt on the property that appeared to have been recently "turned." Tr. p. 401. The officers then discovered what appeared to be a human head wrapped in a sheet buried several feet underground. After bringing in some digging equipment, the police officers

² Miranda v. Arizona, 384 U.S. 436 (1966).

removed a body covered in a sheet that had been wrapped with duct tape. The body was identified as Ruben's and it was determined that a piece of plastic that had been shoved into his mouth had blocked his airway.

The police then interviewed Yzaguirre a second time. After Yzaguirre waived his Miranda rights, he told police officers that he, Perez, and Anguiano had been driving around together "sometime near the 4th of July" and that Perez had suggested that they rob and kill Ruben. Id. at 579, 581. Perez, who was driving, dropped off Yzaguirre and Anguiano at Ruben's residence. Yzaguirre stated that the two entered the home and Anguiano strangled Ruben. Yzaguirre stated that he watched while Anguiano carried Ruben's body, which was wrapped in a sheet and fastened with duct tape, through the kitchen.

Yzaguirre stated that he opened the kitchen door and saw Anguiano place Ruben's body into the trunk of Ruben's yellow Cadillac. Anguiano also showed Yzaguirre a "few hundred dollars" that he had found in Ruben's home. Id. at 580. Yzaguirre then claimed that they drove off in Ruben's burgundy Cadillac and rejoined Perez a few blocks away. Although Yzaguirre stated that he left the body with Anguiano, he admitted that he and Perez rejoined Anguiano at Ruben's home the next day so they could take the television sets.

Thereafter, Yzaguirre, Anguiano, and Perez were arrested and charged with murder and murder in the perpetration of a robbery. At a jury trial that commenced on February 18, 2008, the State offered the videotape from Wal-Mart and several "still" photos that were taken from the tape into evidence. Id. at 336-42. The videotape and photographs purported to depict the transaction reflected in the Wal-Mart receipt that the police officers had

obtained from Ruben's residence. Yzaguirre objected to the admission of the evidence on the grounds that the State had failed to lay a proper foundation regarding the accuracy and authenticity of those items. The prosecutor pointed out that Detective Garber had obtained the video from another detective who "got it from Wal-Mart." Id. at 330-41. The trial court overruled Yzaguirre's objection and admitted the evidence, stating:

[Indiana Evidence Rule] 403 allows for [the] admissibility. I think there's been sufficient foundation to admit the video based on the detective's testimony. The photographs are a partial—a part and partial [sic] of the videotape because they represent the still photographs that the detective indicates that come from his viewing of the videotape and therefore they're consistent with that which he viewed within that first exhibit. So, even the photographs are admissible, also.

Id. at 341.

Following the conclusion of the trial on February 22, the jury found Yzaguirre guilty as charged. At the sentencing hearing on March 18, 2008, the trial court determined that the offense of murder in the perpetration of a robbery should be "set aside" without an entry of a judgment of conviction on that offense. Appellant's App. p. 263. The trial court then sentenced Yzaguirre to fifty-seven years of incarceration. He now appeals.

DISCUSSION AND DECISION

Yzaguirre contends that his murder conviction must be reversed because the State failed to lay a proper foundation for the admission of the videotape and photographs. More particularly, Yzaguirre argues that the State "presented no testimony from anyone who was present during the transaction in question, and hence no attempt was made to authenticate the video or the photographs as demonstrative evidence." Appellant's Br. p. 7. Moreover,

Yzaguirre maintains that there “was not the strong showing of authenticity required for admission of the evidence under the silent witness theory.” Id.

In addressing Yzaguirre’s challenge to the admission of the videotape and photographs into evidence, we initially observe that rulings on the admission of evidence are committed to the sound discretion of the trial court, and great deference is afforded to the trial court’s decision on appeal. Carpenter v. State, 786 N.E.2d 696, 702 (Ind. 2003). An abuse of discretion occurs where the trial court’s ruling is clearly against the logic and effect of the facts and circumstances before it. Hawkins v. State, 884 N.E.2d 939, 943 (Ind. Ct. App. 2008), trans. denied. However, before a reversal is warranted, it must also be established that the error denied the defendant a fair trial. Agilera v. State, 862 N.E.2d 298, 302 (Ind. Ct. App. 2007), trans. denied. In other words, even if the trial court’s decision was an abuse of discretion, we will not reverse if the admission of the evidence amounted to harmless error. Fox v. State, 717 N.E.2d 957, 966 (Ind. Ct. App. 1999). The abuse of discretion standard applies to photographic evidence, including videotapes. Timberlake v. State, 679 N.E.2d 1337, 1340 (Ind. Ct. App. 1997).

We note that a photograph may be admitted as demonstrative evidence if it illustrates a matter about which a witness may testify and if the photograph is authenticated by a witness as a true and accurate representation of that which it is intended to portray. Id. at 1341. In the alternative, a video or a photograph may be admitted under a “silent witness” theory, in which case it is substantive evidence and not merely demonstrative evidence. Edwards v. State, 762 N.E.2d 128, 136 (Ind. Ct. App. 2002). Additionally, when a

photograph or visual recording is offered, not to demonstrate a witness's testimony, but to prove the matters expressed therein without other evidence, a "higher standard" is required to judge whether a sufficient foundation has been laid for the admission of the exhibit. Id. In those instances, there must be a "strong showing of authenticity and competency," and, when automatic cameras are involved, "there should be evidence as to how and when the camera was loaded, how frequently the camera was activated, when the photographs were taken, and the processing and changing of custody of the film after its removal from the camera." McHenry v. State, 820 N.E.2d 124, 128 (Ind. 2005).

In this case, although the videotape contains indications of the time and date, the State concedes, and we agree, that there is no evidence in the record suggesting that the foundational requirements for the admission of the tape and photographs into evidence were satisfied. As a result, we must conclude that the trial court erroneously admitted those items into evidence. However, it is apparent that the receipt, videotape, and still photographs were merely cumulative proof of the evidence that was established through Yzaguirre's confession.

For instance, Yzaguirre admitted to the police that he was with Perez and Anguiano on the day of the murder. Tr. p. 579. The Wal-Mart evidence also establishes this fact and that one of the men left the receipt at Ruben's house. Id. at 307-08. In view of Yzaguirre's admission that he was with the other two men on the day of Ruben's murder, we cannot say that the trip to Wal-Mart and purchase of items at the store was inflammatory, prejudicial, or of great significance so as to warrant a reversal of his conviction. Moreover, as discussed

above, Yzaguirre told the detectives that he heard Perez suggest that Anguiano rob and murder Ruben. Id. at 579. After entering Ruben's home, Yzaguirre stated that he "waited and listened" while Anguiano committed the murder and then helped Anguiano dispose of Ruben's body. Id. at 579-80. Yzaguirre also stated that Anguiano showed him money that had been taken from Ruben's residence, and \$170 in cash was later found in the house that Yzaguirre shared with Perez and his sister. Id. at 346, 383, 570. Yzaguirre also admitted that he, Perez, and Anguiano returned to Ruben's home after the murder and took the television sets. Both sets were found at Yzaguirre's residence. Id. at 240, 244, 363, 386, 427.

The evidence also established that Yzaguirre and Perez kept Ruben's Cadillac for their own use. Id. at 317-18, 350, 619-20, 622-23, 641-46. Moreover, Yzaguirre told the detectives that Ruben's body was bound with duct tape and, indeed, a piece of duct tape was discovered in the yellow Cadillac. Id. at 350-52, 353, 581, 736. As noted above, Ruben's wallet, identification card, and personal papers were found at Yzaguirre's residence and an attempt had been made to burn most of them. Id. at 373-74, 376-77, 380.

In our view, the jury could reasonably conclude from the evidence set forth above that Yzaguirre was guilty of Ruben's murder. Because the improperly admitted Wal-Mart videotape and photographs corroborated Yzaguirre's own confession, the trial court's admission of that evidence amounted to harmless error. Thus, we decline to set aside Yzaguirre's conviction.

The judgment of the trial court is affirmed.

NAJAM, J., and KIRSCH, J., concur.